DOCUMENT RESUME

ED 165 138 CS 204 400

AUTHOR Coulson, David
TITLE Antitrust Law and the Media: Making the Newspapers Safe for Democracy.
PUB DATE Aug 78
NOTE 29p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (61st, Seattle, Washington, August 13-16, 1978); Not available in hard copy due to marginal legibility of original document

EDRS PRICE MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS Broadcast Industry; Communication (Thought Transfer); Competition; *Court Litigation; *Economic Factors; Federal Regulation; *Freedom of Speech; Journalism; Laws; *Mass Media; *News Media; *Newspapers
IDENTIFIERS *Ownership

ABSTRACT

A number of constitutional and economic problems are involved in the process of insuring a free press. The enforcement of antitrust laws by the Justice Department can, but does not, provide adequate safeguards for the public. Beginning with the 1945 Supreme Court decision, "Associated Press v. United States," many court decisions have been made concerning competitive principles, antitrust, and newspapers. Some of the issues involved include diversity of news and opinions; newspapers acting as local monopolies; the growth of newspaper chains and the resulting demise of independently owned newspapers; the financial difficulties of purchasing, establishing, and operating a competing newspaper; joint operation of competing newspapers; the fairness doctrine; the powers of the licensing agency for the broadcast industry; and divestiture when a newspaper owns a radio or television station in the same city. Any answer to the question of how to insure the existence of a free press must include a program that encourages new capital investment in the newspaper industry to stimulate competition, thereby forcing newspapers to give greater attention to opposing views and matters of public interest. (TJ)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED165138

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ANTITRUST LAW AND THE MEDIA:

MAKING THE NEWSPAPERS SAFE FOR DEMOCRACY

BEST COPY AVAILABLE

by

DAVID COULSON

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
David Coulson

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

School of Journalism and
Mass Communication
University of Minnesota

Presented to the Mass Communication and Society Division at the Association for Education in Journalism Annual Convention in Seattle, Wash., August 15, 1978.

Open Paper Competition Session

CS200400

BEST AVAILABLE COPY

Antitrust Law and the Media:

Making the Newspapers Safe for Democracy

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion.
>
> John Stuart Mill, On Liberty

One hears much about reporters' subpoenas and the threat they pose to the public's right to know, but considerably less about other controversies involving the media, the government and the First Amendment. The whole subject of media concentration somehow eludes the nation's press. However, the rise of monopolies and "failing newspapers" have not escaped notice by Congress and the Justice Department. Both branches of government have suggested methods of "solving" the industry's problems. What is common to both approaches is the apparent lack of understanding of the industry's real problems and its unique position under our Constitution.

This paper does not attempt to resolve the myriad constitutional, economic and social issues involved in the chore of insuring a free press. It will, however, illuminate the main constitutional and economic problems involved in this process and demonstrate that the government armed with antitrust laws through its chief enforcer, the Justice Department, can, but does not, provide adequate safeguards. Further, if the citizen's right to a free press is to be more than just an historical oddity, a sensible way of balancing the benefits and dangers of government reg-

ulation must be found.

The Supreme Court initially harmonized the First Amendment with the competitive principles of antitrust laws in Associated Press v. United States:

> Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[1]

The Court opinion,[2] written by Justice Hugo L. Black, ruled that AP bylaws should be "so changed that competition between an applicant and a paper already a member shall no longer be a consideration."[3] AP raised the defense[4] that the First Amendment prevented the government from interfering with the press and that the imposition of antitrust laws was constitutionally proscribed. The Supreme Court, in reference to the First Amendment question, stated:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests on the assumption that

---

1 Associated Press v. United States, 326 U.S. 1 (1945).

2 Justice Felix Frankfurter dissented holding that any contractual restraint is unlawful in this single industry specifically protected by the Constitution against government encroachment. See Howard Ellis, "Paradoxes of the Associated Press Decision--A Reply," U. Chi. L. Rev. 13, 471-6, at 472-3 (1945-6).

3 "The AP Loses," Newsweek, June 25, 1945, p. 86.

4 326 U.S. 1 (1945). Since the Associated Press case, antitrust decisions involving print media firms have not seriously questioned the constitutionality of the application of the Sherman or Clayton Acts to these enterprises. See, e.g., Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

> the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.[5]

The Supreme Court thus recognized our common interest in assuring a diversity of news and opinions. We proceed, as Justice Oliver Wendell Holmes said,[6] on the theory that "the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution."

A decade ago, Professor Jerome A. Barron characterized Holmes' free marketplace of ideas rationale of the First Amendment[7] as "romantic" and called for its burial.[8] Continuing developments in the newspaper industry indicate that instead of burial, what is needed is a realization that the system provides safeguards against government but not private control of idea dissemination. Our competitive economic system previously insured that no interest could become powerful enough to control the industry and thereby the free interchange of ideas. But this competitive process has failed and no adequate substitute has been implemented. Thus, we, through our government, can control only the economic market of the news-

---

5 Id.

6 Abrams v. United States, 250 U.S. 616 (1919) (dissenting opinion).

7 See, e.g., Whitney v. California, 274 U.S. 357 (1927); Thornhill v. Alabama, 310 U.S. 88 (1940); Wieman v. Updegraff, 344 U.S. 183 (1952).

8 Jerome A. Barron, "Access to the Press--A New First Amendment Right," Harv. L. Rev. 80, 1641-78, at 1647 (1967).

paper industry while it can control the important idea market.

Proponents of regulation argue that under present circumstances in the newspaper industry, regulation (to include access rights) is essential if the free press is to be retained.[9] The basis of their argument is that while the rationale underlying Justice Holme's free marketplace of ideas theory may have had validity in the 18th century when Thomas Paine's pamphlets were published, it is presently of questionable value in an era of massive changes within the American newspaper industry. The printed handbill's effect is neutralized by the overwhelming impact of the mass media. Further, the proponents point out, the number of newspapers is continually decreasing,[10] and that the publication in one community of two separately owned, edited and printed papers[11] has dwindled[12] to the point of disappearance.[13]

---

9 "Newspaper Regulation and the Public Interest: The Unmasking of a Myth," U. Pitt. L. Rev. 32, 595-606, at 596 (1970-1).

10 Between 1940 and 1965 the total number of morning dailies declined from 380 to 320, and during the same period the total number of evening dailies fell from 1498 to 1444. See John J. Flynn, "Antitrust and the Newspapers: A Comment on S. 1312," Vandblt. L. Rev. 22, 103-25, at 104 (1968-9).

11 The trend toward ownership concentration in the media is not a recent development. The first merger of newspapers in the country occurred in 1741, less than 40 years after the first Colonial newspaper was founded. This merger was transacted when the Boston Gazette was sold to the New England Weekly Journal. See Edwin Emery, The Press and America, 3d ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1972) p. 37.

12 Sen. Edward Kennedy (D., Mass.) told the Suburban Newspapers of America convention in Boston (May 13) that "98 ercent of the daily newspapers are local monopolies," adding that "the death of many big city papers has been offset by the birth of many in suburbia." Editor & Publisher, May 28, 1977, p. 10.

13 Keith Roberts, "Antitrust Problems in the Newspaper Industry," Harv. L. Rev. 82, 319-65, at 319 (1968).

Consequently, ownership of this country's press is vested in an ever diminishing unregulated minority.

It's a trend that worries many, inside the industry and out, raising fears that a handful of "press lords" may exert undue influence in shaping public opinion.[14] The late reporter and press critic A. J. Liebling assessed the situation in his usual caustic style:

> The industry's ideal now is absolute control in a moderate number of cities, or even one. These become one-ownership towns, and as the publisher turns monopolist, his troubles end. He is in the position of a feudal lord after the period of wars in the Middle Ages ended. He has his goods, but he need no longer fight for it. He is a rentier.[15]

1976 was an extremely active year for the buying and selling of newspapers with 72 changing hands compared with 49 the year before. Far from being "fading" institutions as they are often painted, newspapers can be extremely lucrative. This is especially true for papers with little or no direct competition for readers and advertising revenues in their localities.[16] However, though most newspapers operate as local monopolies, they find themselves in a corporate dilemma that is unusual for growth industries. They usually saturate their areas so that there is little opportunity for large-scale expansion.[17] But, since profits

---

14 "After a Rash of Take-Overs New Worries About 'Press Lords,'" U.S. News & World Report, Jan. 24, 1977, p. 54.

15 A. J. Liebling, The Press (New York: Random House, Inc., 1975) p. 2.

16 "After a Rash of Take-Overs... .," U.S. News.

17 For example, if the practical maximum newspaper sales in an area is 80 percent of households and a local monopoly already sells its papers to 80 percent of households. See Ben H. Bagdikian, The Information Machines (New York: Harper & Row, 1971) p. 128.

can be high, and with them taxes, the investing impulse is strong and expresses itself in the formation of newspaper chains[18] (though in trade literature the word "chain" is shunned and the euphemism "group" is preferred).[19]

The growth of newspaper chains in recent years has been phenomenal. "At the present rate of expansion," Sen. Thomas McIntyre (D., N.H.) said in 1972, "all of the daily newspapers--I said all of them--will be owned by chains in less than 20 years."[20] In 1910--considered a time of national newspaper giants like William Randolph Hearst and Edward Wyllis Scripps--there were 13 chains owning 62 papers, or fewer than 3 percent of the 2400 daily papers of the time.[21] In comparison, by 1971 the proportion of the nation's 1750 dailies owned by chains exceeded 50 percent for the first time. By 1976, while the total of U.S. dailies had remained almost constant, the proportion of chain papers had risen to 59 percent. Only 61 American cities last year had two or more newspapers under separate ownership.[22]

With the demise of the independently owned newspaper, chain owners have begun merging with each other,[23] accelerating newspaper

---

18 A newspaper chain is two or more papers in different locations owned by the same business management.

19 Bagdikian, The Information Machines, pp. 128-9.

20 Donald Paneth, "Free Enterprise of a 'Free' Press," The Nation, May 8, 1972, p. 589.

21 Bagdikian, The Information Machines, p. 129.

22 "After A Rash of Take-Overs. . .," U.S. News.

23 See, e.g., Knight Newspapers and Ridder Publications proposed merger (since has become Knight-Ridder Inc.). "Linking Chains," Time, July 22, 1974, p. 63.

ownership concentration.[24] The informational significance of this is to extend centralization of control of news beyond the local monopoly. Accepting the premise of one-man direction of newspaper enterprises, then theoretically American newspaper readers have their daily printed news and opinion determined by approximately 1750 people (usually men), including one in each of the 1545 cities that have only one newspaper management.[25]

Thus, newspaper publishers exercise business savvy, and the consolidation of the industry continues. The free press concept is experiencing a real credibility lapse,[26] however, with citizens who accurately perceive the inaccessibility of an industry preoccupied with entrepreneurship accompanied by an astronomical rise in publishing costs. In 1835, when James Gordon Bennett bought the New York Herald for $500,[27] anyone could launch a newspaper. Today, it would cost[28] perhaps $10 million[29] to establish a major new daily.

The newspaper industry has reached a point where it is nearly economically impossible to operate a competing newspaper, nearly financially impossible to purchase a prosperous one, and generally impossible to establish a newspaper in a city where one already

---

24 "After a Rash of Take-Overs. . .," U.S. News.

25 Bagdikian, The Information Machines.

26 Richard L. Tobin, "Monopoly Newspapers and the Credibility Gap," Saturday Review, May 9, 1970, p. 57.

27 Frank Luther Mott, American Journalism, 3d ed. (New York: MacMillan Company, 1962) pp. 229-30.

28 Rupert Murdoch in January 1977 acquired the New York Post for $30 million. See, "After a Rash of Take-Overs. . .," U.S. News, p. 55.

29 Paneth, "Free Enterprise. . ."

exists. Consequently, the newspaper industry is closed to any prospective new entrants. "Almost all of the newspapers that are profitable are already consolidated in chains,"[30] observes Ben H. Bagdikian, former newspaper editor turned press critic.

It is paradoxical that an economic system founded on competition has evolved into one which fosters monopoly. Unfortunately, this dramatic economic change has been accompanied by a parallel ideological change; as corporate consolidation is viewed by many Americans as inevitable or even desirable.

In a review of Bruce Owens' book, Economics and Freedom of Expression: Media Structure and the First Amendment, University of Chicago Law Professor Richard Posner criticized the author on his major premise that media entrepreneurs often sacrifice profits to their desire to sway public opinion. This, the critic disputed, saying instead that "oligopolistic industries compete more vigorously in nonprice dimensions than competitive ones."[31] While Posner denies that this view constitutes an argument that media concentration poses no threat to diversity of expression, it lent itself comfortably to an adverse review[32] eight years earlier of Bryce Rucker's The First Freedom. The reviewer embraced the notion, generally associated with the American Newspaper Publishers Association (ANPA),[33] that competition among news-

---

30 "After a Rash of Take-overs. . .," U.S. News, p. 54.

31 Richard A. Posner, "Monopoly in the Marketplace of Ideas," Yale L. Rev. 86, 567-72, at 572 (1977).

32 O. W. Riegel, review of Rucker's book in Public Opinion Quarterly, 33:650 (Winter 1969-70).

33 For ANPA's position consult Zechariah Chafee Jr.'s Government and Mass Communications, II, 621-2 (1947).

papers is not desirable.

The courts held nearly 20 years ago in the Union Leader case[34] that some cities are unable to support two competing quality newspapers.[35] In such so-called "natural news monopolies" only if a competing newspaper is a "failing corporation" and there is no offer from an outsider to buy will purchase by the survivor not harm competition.[36] Further, the Union Leader ruling stated that the antitrust laws apply where "the person who foresees a fight to the death intends to use or actually does use unfair weapons."[37]

Publishers, however, are not under obligation to remain in business if they are losing money, and are free to divest themselves of their property subject only to antitrust laws. The Supreme Court observed in 1952 in Times-Picayunne v. United States:

> We are mindful of the publishers' plight. Confronted by high newsprint costs and constantly rising labor costs, the metropolitan dailies at the same time are having trouble, like other businesses, in following their readers to the suburbs. To the inroads of the suburban press on their circulation must be added the loss to television and to radio of additional revenues from advertising--"the economic mainstay of the newspaper business."[38]

---

34 Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass.,1959).

35 In markets with a population of less than 650,000 local daily newspaper competition cannot be expected unless the publishers agree to a joint printing arrangement. Then, the mark can be lowered to approximately 200,000. See Richard J. Barber, "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy," Louis. L. Rev. 24, 503-554, at 543 (1964).

36 Emanuel Celler, "The Concentration of Ownership and the Decline of Competition in News Media," Antitrust Bul. 8, 175-85, at 183 (1963).

37 180 F. Supp. 125, at 140.

38 Times-Picayunne Publishing Co. v. United States, 345 U.S. 594, at 604 (1953).

ANPA thus suggests that newspapers cannot be categorized as a market distinct from other media and that therefore no need exists to design an antitrust policy to promote competition specifically among newspapers. But a decade ago, in United States v. Times Mirror Co., the Supreme Court opinion read as a disclaimer to ANPA's contention:

> (t)he daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics and uses which make it distinguishable from all other products.[39]

As a distinct line of commerce,[40] the newspaper industry should remain as competitive as possible to provide the consumer with a better product: that is the principle behind the Court's decision in the 1969 case of Citizen Publishing Co. v. United States.[41] In the newspaper industry, that product, ultimately, is an informative publication. Implicit in Citizen is the companion principle that competition within an industry will prevent an individual or corporation from becoming dominant and foreclosing the introduction of new ideas into that industry.

The newspaper industry is neither alone nor unique among corporate enterprises in its readiness to adopt anticompetitive practices. Further, since the decline of competition in the industry usually takes the form of outright combinations between competing publishers, it would appear that antitrust intervention

---

39 United States v. Times Mirror Co., 390 U.S. 712 (1968).

40 The fact that a publisher handles news while others handle goods does not afford him a peculiar constitutional privilege with which he can flagrantly violate the antitrust laws. See, e.g., Associated Press v. United States, 326 U.S. 1 (1945); Lester J. Albrecht v. The Herald Co., 390 U.S. 712 (1968).

41 Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

could play an important role in stunting the growth of monopoly. The Justice Department, though, has initiated very few proceedings involving newspapers.[42] Since 1963,[43] the government has bolstered its antitrust actions against the industry,[44] but for over 30 years the legality of joint newspaper operating arrangements went unchallenged.[45] In 1965, however, the Justice Department brought a civil antitrust action against two Tucson newspapers which had engaged in a joint operation since 1940.[46] The legislative reaction that resulted in the Newspaper Preserva-

---

42 Barber, "Newspaper Monopoly. . .," Louis. L. Rev., at 504.

43 Only eight major suits were brought against newspapers prior to 1963, three of which were private actions. Roberts, "Antitrust Problems. . .," Harv. L. Rev., at 341. The infrequency of prosecution may be attributable to the considerable discretion that the enforcement agencies possess in selecting cases to prosecute. Despite the amenability of newspapers to prosecution officials may have avoided the industry because of sensitivity over government regulation of the press. See Recent Decisions, "Antitrust," Geo. Wash. L. Rev. 45, 572-96, at 576 (1977). Additionally, because enforcement agencies do not have the time, personnel or resources to prosecute all offenders, they are less inclined to file actions against members of an industry that can assert countervailing constitutional principles, id., that are less likely to be successful, id., and in which the already difficult problems of proof are compounded. See Comment, "The Joint Newspaper Operating Case: A Face Lifting for the Failing Company Doctrine," Ariz. L. Rev. 11, 531-6, at 535-6 (1969).

44 Roberts, "Antitrust Problems. . .," Harv. L. Rev.

45 It was asserted before a Congressional Antitrust Subcommittee that the Justice Department "was either notified or knew of . . . (these) arrangement(s) and there was either approval--express or implied--or acquiescence in this type of arrangement." Since antitrust officials were principally concerned with eliminating improper market conduct in the newspaper industry, "the mere existence of a joint operating arrangement--though monopolistic in structure--(need) not result in antitrust litigation." "Antitrust," Geo. Wash. L. Rev., at 576-7.

46 394 U.S. 131 (1969).

tion Act (NPA)[47] was in response to the proceedings against Citizen Publishing Company. Legislation was introduced in both the House and Senate of the 90th Congress[48] to protect the challenged newspapers and the 21 other existing joint operations from antitrust prosecution and private liability.[49]

By permitting newspapers under certain conditions to enter joint operating arrangements normally considered violations of the antitrust laws,[50] the bills' supporters allegedly hoped to protect the public's interest[51] in a diversified, quarrelsome and competitive press.[52] Characterizing the exemption as protecting editorial and news competition, they asserted that the bills were aligned with basic antitrust principles.[53] Opponents,[54] however,

---

47 The NPA was passed because Congress believed the Court in Citizen had failed to understand the problems confronting the newspaper industry and applied the antitrust laws too harshly to joint operations. "Antitrust," Geo. Wash. L. Rev., at 594.

48 The Senate bill, entitled the Failing Newspaper Act, was introduced on March 16, 1967. It was sponsored by 15 senators whose common interest in the bill, with one exception, stemmed from the presence of joint operations in their states. Flynn, "Antitrust and the Newspapers. . .," Vandblt. L. Rev., at 103.

49 "Antitrust," Geo. Wash. L. Rev., at 577.

50 See "Preserving Newspapers," Newsweek, July 20, 1970, 67.

51 Luther A. Huston, "President Signs Antitrust Exemption for Newspapers," Editor & Publisher, August 1, 1970, p. 9.

52 See Barron, "Access. . .," Harv. L. Rev., at 1644-7.

53 Huston, "President Signs. . .," Editor & Publisher.

54 The Justice Department opposed the bill on the basis that publishers could legally merge their printing and distribution operations; but to allow them to fix advertising rates and split profits in a manner denied to every other industry would be an affront to the basic principles of free enterprise. The Federal Trade Commission concurred. Peter Barnes, "Farewell, Free Enterprise," The New Republic, October 17, 1970, p. 16.

argued that the exemption would accomplish greater concentration in the industry.[55] The session ended short of the bill's passage, but it was reintroduced in both houses with greater urgency at the start of the 91st Congress.[56] Its eventual adoption "after nearly two years of Congressional hearings and lobbying" was seen by one Washington press observer as creating "a sort of halfway house between competition and monopoly of local papers."[57]

The NPA is substantially less than a model piece of legislation. Inherent provisions which allow fixing advertising rates and pooling profits without adjusting them to costs are of dubious legality,[58] although it is difficult to see how a joint agreement could operate otherwise. A far more fundamental flaw, however, is the provision that a single public official, the Attorney General, is given the right to approve or disapprove of any joint agreement.[59] That this power should be given to a single

---

55 There is a wide range of antitrust, antimonopoly, postal and tax law that is applicable without infringement of the First Amendment; yet the press is traditionally permitted greater latitude and is reprimanded more gently about corporate misbehavior than are other enterprises. Ben H. Bagdikian, The Effete Conspiracy (New York: Harper & Row, Publishers, 1972) p. 61.

56 "Antitrust," Geo. Wash. L. Rev., at 578-80.

57 Arthur E. Rowse, "The Press Dummies Up," The Nation, June 30, 1969, p. 816.

58 Regardless of the 1945 decision which forced AP to sell its services to all "bonafide" applicants, newspapers still receive many favorable antitrust considerations, such as categorizing carriers as private contractors instead of employees and allowing joint printing and advertising arrangements by local newspapers. Newspaper feature syndicates still sell their wares on the basis of territorial exclusivity. Ronald T. Farrar and John D. Stevens, eds., Mass Media and the National Experience (New York: Harper & Row, Publishers, 1971) p. 33.

59 "ANPA Objects to New Rules for Joint Paper Operations," Editor & Publisher, February 2, 1974, p. 45.

official[60] who is not even elected has frightening overtones.

During the same term it decided Citizen, the Supreme Court handed down the decision in Red Lion Broadcasting Co. v. FCC.[61] The emphasis in Red Lion on the First Amendment as a guarantee of effective public debate, rather than as a barrier between press and government, had a significant impact on attitudes toward regulation of newspapers. The fairness doctrine had been upheld as a constitutional and essential method of preventing monopolization of broadcast editorial power.[62] This naturally raises the question as to whether the same stipulation can be constitutionally applied to a monopoly newspaper.[63] This issue was raised in Miami Herald Publishing Co. v. Tornillo,[64] in which the Court invalidated a Florida right-to-reply statute applicable to news-

---

60 See, e.g., Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940). The respective city and state ordinances unconstitutionally created one-man censorship boards. See Donald M. Gillmor and Jerome A. Barron, Mass Communication Law, 2d ed. (St. Paul: West Publishing Co., 1974) pp. 36-7.

61 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Red Lion Broadcasting Co. was sued by the FCC because it had breached its responsibilities under the fairness doctrine. This doctrine is embodied in a statutory regulation which requires that the broadcast media provide adequate time to controversial issues of public importance which is fair in its reflection of opposing views.

62 The courts have long ruled that, in the award of a license to use a public asset, the FCC may require "the widest possible dissemination of information from diverse and antagonistic sources." Scripps-Howard Radio, Inc. v. FCC, 189 F. 2d 677 (D.C. Cir. 1951).

63 The considerations which government intervention in local newspaper monopolies should adopt are similar to those which antitrust intervention should also depend. A primary consideration should be the newspaper's geographic and product market. A further correct First Amendment perspective should be whether there are alternative sources of information or audience access to which readers and advertisers can turn.

64 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

papers as a violation of freedom of the press.[65]

Tornillo conflicts with Red Lion in its treatment of the editorial function as privileged. The Supreme Court has approved much greater governmental regulation of the electronic media than of the print on the premise that radio and television operate on a "limited" spectrum. In truth, the print media utilize equally scarce resources--otherwise there would be a greater abundance of them. Furthermore, the scarcity of spectrum space is largely an artifact of governmental regulation.

Justice William O. Douglas, who did not take part in Red Lion, joined in CBS v. Democratic National Committee[66] to accept the necessity of government licensing, but felt that the role of the government should proceed no farther than spectrum allocation--a stance similar to the one urged by the network in NBC.[67] Another staunch disbeliever of increased editorial control of the broadcast industry by the government is a stout, 83-year-old constitutional lawyer, Sam Ervin, who eight years ago as North Carolina's senior senator said:

> While the Founding Fathers did not contemplate the media of radio and television when they wrote the First Amendment, their reasons for protecting the printed press from government control apply equally

---

65 A newspaper under this state statute had to supply free space upon request to any candidate for nomination or election it assailed in its columns.

66 CBS v. Democratic National Committee, 412 U.S. 94 (1973).

67 National Broadcasting Co. v. United States, 319 U.S. 190 (1943). It was argued in this case that the FCC's authority was limited solely to providing effective spectrum frequency. Otherwise, it was argued, the FCC does not possess judgmental authority over broadcast licensees. See Gillmor and Barron, Mass Communication Law, p. 759.

> to the broadcast media . . . If First Amendment principles are held not to apply to the broadcast media, it may well be that the Constitution's guarantee of a free press is on its death bed . . .
> . . . Whatever the dangers to freedom of expression that result from concentrated ownership of the broadcast media, it is nowhere near as dangerous as leaving to a few government officials the power to decide what can be discussed and what cannot; and even when ultimate truth has been discovered and what it is . . .
> . . . With broadcasting, just as with the printed press, governmental power to protect the public from excess and foolishness is governmental power to censor.[68]

NBC's Bill Monroe warns his colleagues of the older print media, which is still operating under the "dowdy, old-fashioned version" of the First Amendment, of the "candy-coated, tangerine-flake, streamlined baby" they may soon come to know. This updated model of the First Amendment, he says, will be "equipped with federal agencies to share the decisions of fairness and fitted out with friendly congressmen offering statutory advice on election coverage."[69]

The Supreme Court consistently has ruled that legislation and regulations which inhibit First Amendment rights are allowable only if they accomplish a compelling purpose by the narrowest possible means.[70] Unfortunately, challenges to the constitutionality of the broadcast licensing[71] process have never been argued on this basis. Furthermore, sources of editorial power

---

68 Bill Monroe, "The First Amendment Meets a Double Standard," The Quill, December 1971, p. 13.

69 Id.

70 See, e.g., United States v. Robel, 389 U.S. 258 (1967); NAACP v. Alabama, 377 U.S. 288 (1964); NAACP v. Button, 371 U.S. 415 (1963). Cf. Cantwell v. Connecticut, 310 U.S. 296 (1940).

71 Milton used the word "licensing" to describe censorship. Zechariah Chafee Jr., Government and Mass Communications, II (Chicago: The University of Chicago Press, 1947) p. 710.

in the print media are different from those in broadcast, since resources utilized by newspapers and magazines are usually distributed through the market. Nevertheless, a vital news and opinion source, the local newspaper, is distributed quite sparingly.[72] To insure a variety of "voices," despite the newspaper monopolies in most cities today, our antitrust laws need to be seriously concerned with the degree of cross-ownership of broadcast facilities by newspapers.[73]

Richard Jencks, a CBS vice president, believes the major monopolistic concern is at the local level, and that antitrust laws are the appropriate remedy. He sees the really difficult question as newspaper ownership:[74]

> Breaking up newspaper ownership may result in fewer outlets and therefore less diversity and more concentration. It may very well be that as television nibbles away at local advertising and takes a greater share of local advertising from newspapers, the goals of diversity would be better served if the Commission

---

72 Abbott B. Lipsky Jr., "Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation," Stan. L. Rev. 28, 563-88, at 578-80 (1976).

73 See generally, "Newspaper Groups Acquire Broadcasting Properties," Editor & Publisher, July 2, 1977, p. 7.

74 Newspapers own 25 percent of the country's television stations, and these stations have 34 percent of all revenues (revenues are a rough measure of share of total audience). In the top 25 television markets newspapers own 35 percent of the television stations and have 38 percent of the revenues. In 16 markets where there are only two television stations, newspapers own over half the stations. Newspapers own 249 AM radio stations, which is only eight percent of all stations, but 97 percent of these are in the top 10 markets, where a third of all Americans live, and 80 percent are in the top three markets. But see, Bagdikian, The Information Machines, pp. 174-5. According to the FCC, in 1969 there were 72 cities, all with populations under 100,000, where the only daily newspaper controlled the only local radio station and where there were no television stations. But see, John L. Hulteng and Roy Paul Nelson, The Fourth Estate (New York: Harper & Row, Publishers, 1971) pp. 36-7.

encouraged newspaper ownership rather than discouraged it.[75]

The antitrust laws as presently administered provide a minimal check against media concentration. They do not apply to the chains, which operate newspapers in different cities, and they do not affect monopolies unless they are created or maintained improperly. Their impact on local television-newspaper combinations has gone untested. Further, the Justice Department has not brought antitrust suits against renewal of a television license held by a local newspaper. Such attempts might fail and at best would have to be combatted through long trials on a city-by-city basis.[76]

The FCC, however, does have authority to decline to license television stations to the owners of daily newspapers in the same city.[77] In fact, the Commission recently ordered divestiture in the cases of seven out of 79 television-newspaper and 16 radio-newspaper co-located combinations.[78]

Further, a recent U.S. Court of Appeals ruling, which requires joint ownership of a newspaper and broadcasting station to serve the public interest, may directly affect the remaining 72 television-newspaper ownerships and an undetermined number of newspaper-radio ownerships. The appeals court decision in National

---

75 William L. Rivers and Michael J. Nyhan, eds., Aspen Notebook on Government and the Media (New York: Praeger Publishers, 1973) p. 101.

76 Stephen R. Barnett, "Merger, Monopoly & a Free Press," The Nation, January 15, 1973, pp. 79-80.

77 Compare Paul Jess, "Antitrust Law: A New Approach to Access to the Media" (unpublished Doctoral dissertation, School of Journalism, University of Minnesota, 1972) pp. 115-6.

78 National Citizens Committee for Broadcasting v. FCC, 555 F. 2d 938, 2 Med. L. Rptr. 1405, at 1410 (1977).

Citizens Committee v. FCC,[79] written by U.S. Circuit Chief Judge David L. Bazelon, did not directly order the newspapers to divest themselves of their broadcast operations, but did order the FCC to finally establish divestiture guidelines. Bazelon's decision, which was appealed to the Supreme Court last fall, stated, "We believe . . . that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest."[80]

The Commission, however, does not have a definitive interpretation of the term "public interest," which is subject to contemporary standards and practices. The Bazelon decision leaves the FCC the authority to decide whether or not the ownership of a newspaper and broadcast facility unquestionably serves the public interest. Therefore, the Commission will first have to determine the cross-ownership's public service record before ruling on license application to decide whether a facility exists in the community that could provide service more beneficial to the public. If so, the FCC can order the joint-ownership company to sell its interest in one medium or the other. While on January 31, 1975, the FCC adopted a rule that joint newspaper-broadcast ownerships could not be formed in the future, the Commission has routinely waived its cross-ownership rule.[81] The Commission adopted the position,[82] according to Bazelon's opinion, that divestiture was not required unless evidence existed that such a joint ownership

---

79 555 F. 2d 938 (1977).

80 Id., 1427.

81 See "Newspaper Groups. . .," Editor & Publisher.

82 See also, 53 F.C.C. 2d 589 (1975).

was clearly detrimental to the public interest.[83]

In the nearly 35 years since the FCC last made a broad-scale inquiry into newspaper-broadcast combinations, two developments have transformed the media landscape. The rise of television and the rapid development of newspaper monopoly have made it clear that any concern over media concentration must seriously consider newspaper-television combination. FCC Chairman Dean Burch, concurring in the Commission's rule-making proposal has put the problem succinctly:

> There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then are the guts of the matter.[84]

Regardless of FCC rules, there is much media ownership concentration which lies outside of the Commission's jurisdiction. It is in these areas that the Justice Department must concern itself. And it is in these areas that imaginative application of antitrust law could promote a reversal of the decades-old trend toward increased concentration of ownership in the communication industry. A young lawyer in the "hell-raising tradition" who "asks irreligious questions in simple declarative English,"[85] be-

---

83 Approval of the Commission's action was conditioned on the outcome of Supreme Court review of the Appeals Court ruling that the FCC, in its cross-ownership rule, had not justified the grandfathering of existing broadcast-newspaper holdings. 555 F. 2d 938, 2 Med. L. Rptr., at 1425.

84 Stephen R. Barnett, "The FCC's Nonbattle Against Media Monopoly," Colum. J. Rev., January/February 1973, p. 61.

85 Ben H. Bagdikian, "News as a Byproduct," in Our Troubled Press: Ten Years of the Columbia Journalism Review, Alfred Balk and James Boylan, eds. (Boston: Little, Brown and Company, 1971) pp. 241-2.

lieves we have available governmental machinery which is capable of limiting excessive accumulations of power over the mass media, at least in theory and to some extent. The former FCC commissioner, Nicholas Johnson, further believes the Justice Department has authority under antitrust laws to breakup media combinations which "restrain trade" or which "tend to lessen competition."[86]

A major reason antitrust law is perceived as being impotent to deal with media ownership concentration is that the Justice Department has chosen to attack conduct[87] rather than market concentration or structure. Not only does this focus often fail in important cases, it also treats a symptom rather than the cancer. Nearly 15 years ago, a law professor who was concerned about this approach, stated:

> . . . If newspaper monopoly is fundamentally the product of technological and market forces, focusing attention on specific practices can represent a waste of limited enforcement resources. Moreover, if the real cause is an imbalance between the economics of newspaper publication and the size of most markets, antitrust relief will then provide no real solution at all.[88]

The major problem in media ownership concentration is dominance in the market, not illegal market behavior. Even presuming all media owners who enjoy a dominant market position were engaging in illegal practices under the antitrust laws, forcing

---

86 Nicholas Johnson, "The Media Barons and the Public Interest: An FCC Commissioner's Warning," in Mass Media and the Law: Freedom and Restraint, David G. Clark and Earl R. Hutchison, eds. (New York: John Wiley & Sons, Inc., 1970) p. 119.

87 Illegal behavior in an antitrust sense is extremely difficult to prove in a court of law. See, e.g., "Antitrust Probe Dropped in California," Editor & Publisher, August 6, 1977, p. 14.

88 Barber, "Newspaper Monopoly. . .," Louis. L. Rev., at 17.

them to stop those illegal practices would not enhance competition in the marketplace. Their competitors remain dominated and possible competitors are still barred from entry into the market by the dominant owner's position. The Justice Department must realize this fact if the antitrust laws are to effectively accomplish their primary purpose of promoting competition. While the antitrust laws cannot insure competition, they can guarantee that the marketplace remains open allowing relatively easy access.

Diversity--and the competition that it creates--does not promise good news coverage or a fair champion for every point of view, but it increases the odds. Says analyst Bagdikian: "I don't want to pretend that all independently owned newspapers were great paragons of journalism because obviously they weren't. But the publisher whose fate and ego are involved in the community is more apt to take the coverage of the community more seriously and enhance the property than someone who is using that property as a source of capital for investment elsewhere."[89]

The regrettable economic reality is that local newspaper competition is not as monetarily advantageous to media owners as a monopoly. Elimination of competition permits the sole remaining publisher to consolidate advertising revenue and to benefit from the economic efficiency of one plant, one staff and exactly as much news coverage as he determines most feasible. And why not? The advertisers require his forum and the readers have no other comparable option. His income will immensely overshadow his outlay, so he can afford to pay a generous price for his competitor

---

89 "After a Rash of Take-Overs. . .," U.S. News, p. 56.

newspaper beyond what it might be worth to a buyer from outside, who would continue to operate it competitively.

Communication monopolies decrease the chances that an interested party will notice and call attention to corporate conflicts in the news. Unfortunately, competition does not insure mutual monitoring on the corporate level.[90] It must be recognized that the interests of the corporate newspaper owner do not necessarily conform with those of the public, so as to focus attention on relevant programs and perhaps statutory schemes which tend to cause the two interests to merge, or minimally move closer together. The most threatening problem appears to be monopoly.

As Johnson has pointed out, legal rules for the elimination of monopoly restraints are already embodied in the antitrust laws. The Supreme Court in AP held that a national news service was subject to general business and police regulations, and therefore the antitrust laws constitutionally applied. The antitrust laws are particularly well designed to abolish monopoly restraints in mass communication markets because their enforcement permits the competitive forces to perform the "regulatory" function, thereby eliminating any reason for detailed government intervention in First Amendment processes. Additionally, a strict scrutiny approach would invite Supreme Court inquiry into possible political abuse of antitrust enforcement by the Justice Department.

The monopoly dilemma occurs because of the technology of printing and distributing newspapers, therefore the remedy can

---

90 There is competition for advertising, circulation and even news in Houston, Chicago, Los Angeles and San Francisco, but it stops short of the executive suites. Bagdikian, The Effete Conspiracy, p. 66.

and should be limited to those production stages, and excluded from the content creation or editorial functions. Despite its shortcomings, NPA is a significant step toward such a regulatory strategy. A desired balance can be achieved by strictly scrutinizing asserted justifications offered for specific regulatory schemes, and by requiring that permissible purposes be accomplished in ways that preserve, as much as possible, the traditional separation of press and government.

Any meaningful solution must include a program which encourages new capital investment into the newspaper industry to finance additional newspaper units. The investment tax credit has continuously proven to be an inducement for industry to expand its facilities when considered to be in the national interest. Perhaps Congress should double or even triple the tax credit rate for investors seeking entrance into the newspaper industry. If successful, this ploy would have the immediate effect of stimulating competition between newspapers and would force the monopoly newspaper to give greater attention to opposing views and matters of public interest.

One alternative may be the granting of a tax credit to existing newspapers determined by the number of "non-staff" editorials published above a specified minimum. Again, the desired effect would be to encourage existing newspapers to provide more space for editorials which would stimulate the interchange of ideas through this medium. The public's interest in information should clearly justify any tax revenue losses.

Another proposal aimed at the existing newspaper landscape is tax relief legislation designed to inhibit the rapid demise of

Letters

GRAMMAR TESTS

'e were pleased to learn that our
bor, Penn State, has decided to re-
students planning to major in jour-
to pass a test in language skills
:nrolling in its basic newswriting
We regret, however, that those
t the test will only be advised
:r the program rather than for-

past two years, we have re-
nts wishing to transfer into
om other majors to pass a
e exam covering spelling,
ure, vocabulary and read-
tion. Starting next year
'l entering freshmen who
s journalism majors to
re is nothing advisory
who do not pass the
journalism courses
majors. The exam
en as the student
l only once each

nitment to ex-
arted. If we
ly genuinely
merely ad-

FEEDBACK — Vic Cantone

BETTER LATE THAN NEVER.

acy and Fair Play of the *Des Moines Register* and *Tribune* was the first of its kind.

According to Nelson Crawford in *The Ethics of Journalism* (1924), Ralph Pulitzer started a bu-eau of the same name for the *Ne* *ld* in 1913. Craw-
ford ng the purpose
te accuracy
lessness,
."
roit

must be apparent imprecise writing is not acceptable. Nor are interpretive pieces that are endlessly filed with some writer's opinion, backed up with little fact.

News writing that is loosely and imprecisely done in damaging to the press. It is these failures that damage public confidence in the press. Surely the public does not fault newspapers fo
the truth, for aggres
tence.
Th

independent newspapers. Introducing his bill last year, Rep. Morris K. Udall (D., Ariz.) stated: "It provides estate tax relief to the owners of independent newspapers as an inducement not to sell their newspapers to giant group organizations."[91] The legislation is applauded by many publishers for recognizing the threat monopolies pose to the public interest through their disparate influence on the flow of independent news and commentary. Publisher John Seigenthaler of the Nashville Tennesgean in welcoming the bill went on to point out an all too prevalent corporate concern the newspaper industry unfortunately often subscribes to. "The groups that dominate much of the newspaper industry at this time, are too often interested only in the bottom line and not in the content of the newspaper."[92]

Seigenthaler's statement reiterates one of the fundamental problems which must be resolved by government with regard to newspapers--the implementation of programs which causes the interests of newspaper owners to coalesce with those of the public. Protection of the public's right to information on government affairs of public importance can only be achieved when it is recognized that normal business interests, not those of the public, are paramount to the newspaper owner. Only through the introduction of incentives which commonly motivate any big business will the interests of the public receive higher priority from the newspaper industry.

---

91 The proposed bill will provide a means to set aside sums during the lives of newspaper owners for payment of their estate taxes, and also to deter payment of estate taxes for a reasonable period after their deaths. I. William Hill, "Udall Bill Gets Favorable Reaction from Newpapers," Editor & Publisher, Oct. 15, 1977, p. 9.

92 Id.

Since therefore, the knowledge and survey of vice in this world is so necessary to the constitution of error to the confirmation of truth, how can we safely, and with less danger, scout into the regions of sin and falsity, than by reading all manner of tractates and hearing all manner of reason?

Milton, Areopagitica